May 23, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation

MB Docket No. 02-277
MB Docket No. 01-235
MB Docket No. 01-317
MB Docket No. 00-244

MB Docket No. 93-25

Dear Ms. Dortch:

On May 22, 2003, Andrew Jay Schwartzman, Cheryl Leanza and Harold Feld of the Media Access Project met with Chairman Powell, his Legal Advisor Susan Eid, and his interns, Parviz Parvizi and Amanda Walker.

The first topic of discussion was the pending reconsideration of the Commission's "DBS public interest" order. Mr. Schwartzman stated that 47 USC §335(a) contains a directive to the Commission "to apply" political broadcasting requirements on DBS operators, and that the Commission's order now under reconsideration improperly defers action to implement this mandate. He said that the failure to prescribe an enforcement mechanism cannot be reconciled with Section 315 of the Act, which gives rights to candidates which trump those of broadcasters, and Section 312(a)(7), which requires the Commission to give predominant weight to candidates' needs. The"wait and see" policy the Commission adopted is particularly ill-suited where, as here, controversies typically arise during time-delimited election campaigns. Finally, he noted that the DBS industry's history of resistance to these and other provisions of the Communications Act further supports the value of adopting specific regulatory standards.

With respect to the Commission's biennial review of its broadcast ownership rules, Mr. Schwartzman stated that there is no valid justification for maintaining the 50% "UHF discount" in calculating a broadcaster's audience reach under the so-called "national ownership cap." He noted that there is no affirmative case for retaining this provision, and that the Chairman and others have said that any rule which lacks an empirical grounding should be repealed. Mr. Schwartzman stated that disparities in UHF coverage have been substantially ameliorated by growth in MVPD penetration, including the growth of homes with multiple MVPD-connected sets, statutory must-carry and channel positioning, and the development of a fourth major network and several "baby" networks. He noted the inconsistency in treating UHF stations as equivalent to VHF stations in the Commission's duopoly rules while giving them half as much significance in calculating the national ownership cap. Given the changes, the trends and the need for providing certainty as we move towards the coming digital transition, the best course would be to eliminate the discount entirely.

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Mr. Schwartzman pointed out that even if the Commission were to decide to retain some disparity in treating UHF stations under its ownership rules, such a decision would require the Commission to justify the size of any such discount. There is nothing on the record to justify any discount, much less a 50% discount. Based on profitability, sales prices (controlled for network affiliation) and advertising rates, he said the market valued UHF stations at far more than 50% of the value of VHF stations. He pointed to two studies filed in Docket 94-135 by Economists, Inc. for the proposition that UHF/VHF disparities had largely disappreared by 1995. He said that, while a 10% or 15% differential might be justified, nothing close to 50% could possibly be supported on the record before the Commission.

The Chairman observed that the central fact underlying the UHF discount is the limitation in the signal coverage of UHF stations, and that this has not, and will not, change. Mr. Schwartzman said that the national ownership cap was developed to address the power of group owners, and that their ability to influence public opinion and program markets is based on their cumulative viewership, not the technological limits of UHF signals. He pointed to Commission precedent holding that the so-called UHF disparity has diminished, including the repeal of the *Carroll Doctrine*, and the repeal of PTAR. These decisions have been based upon increased economic strength of UHF stations, not their signal limitations.

Ms. Eid raised questions as to whether repeal of the UHF discount would not be a regulatory, rather than deregulatory, step. Mr. Schwartzman and Mr .Feld replied that, to begin with, the discount is just a definition, and not an ownership limit *per se.* The concept of deregulation includes simplification as well as repeal; indeed, Section 202(h) contemplates that the Commission may find it necessary or desirable "to modify" FCC rules.

Ms. Eid and the Chairman also wondered about the new disparities which would be created by repeal of the UHF discount. Mr. Schwartzman opined that grandfathering might well be appropriate, especially since some UHF groups are likely to be sold off in part or in whole. Mr. Feld stated that the Supreme Court decision in *FCC v. NCCB*, 436 U.S. 775 (1978) addressed precisely such a situation and gave the Commission very broad authority to fashion a transitional scheme. Although the Commission found that newspaper/broadcast cross-ownership should be prohibited, its decision to grandfather all but 16 "egregious" cases was permissible because it "reflect[ed] a rational weighing of competing policies,..." *Id.*, 436 U.S. at 803.

Sincerely,

Andrew Jay Schwartzman
President and CEO

cc. Chairman Powell
Susan Eid
Parviz Parvizi
Amanda Walker